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No. 10-711

(3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

Petitioner,

v.

VP BUILDINGS, INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The United States Bankruptcy Code, 11 U.S.C. §§ 503(b)(1)(A) and 507(a), provides that claims for costs and expenses incurred during the administration of a bankruptcy case, denominated as administrative expense claims, may be eligible for priority of payment.

Petitioner, National Union Fire Insurance Company of Pittsburgh, Pa. provided VP Buildings, Inc., a debtor in possession, together with its affiliated debtor companies, insurance coverage for workers' compensation risks attendant to the operation of debtor's business during the bankruptcy administrative period.

The terms of such coverage provided that Petitioner administer, adjust and pay workers' compensation claims for injuries that occurred during the coverage period, whether such claims were made during or after such period. VP Buildings, Inc. was obligated to *reimburse* Petitioner for the deductible portion of such payments *after* Petitioner advanced such payments to claimants.

The narrow issue presented by this case is whether Petitioner may, notwithstanding the terms of the insurance contracts making VP Buildings, Inc.'s reimbursement obligation contingent on Petitioner's payment obligation, force VP Buildings, Inc. to immediately pay, as an administrative expense, estimated future deductibles that Petitioner had not yet paid as of the termination of VP Buildings, Inc.'s bankruptcy estate and may never pay.

CORPORATE DISCLOSURE STATEMENT

VP Buildings, Inc. has been dissolved. VP Buildings, Inc. Distribution Trust, its successor in interest, has no parent corporation and no publicly owned corporation owns ten percent or more of the stock of VP Buildings, Inc. Distribution Trust.

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STATEMENT

This is a dispute about a contract and whether a Bankruptcy Court may alter its terms to rescue a creditor from its own miscalculations. For many years, Petitioner, a sophisticated nationally recognized insurer, provided, in arms-length business transactions, workers' compensation insurance coverage to LTV Corporation ("LTV"), together with certain of its subsidiaries and affiliates, including VP Buildings, Inc. ("VP Buildings"). These arrangements were renewed immediately after LTV, together with its subsidiaries and affiliates, including VP Buildings, filed voluntary petitions for relief under chapter 11, of title 11, of the Bankruptcy Code (the "Code") on December 29, 2000 (VP Buildings, together with four other LTV subsidiaries, are hereinafter collectively referred to as the "VP Debtors").[1]

The parties agree that, like most entities operating in bankruptcy, VP Debtors was required to secure workers' compensation insurance. Pet. 2. The terms of the workers' compensation insurance coverage provided by Petitioner to VP Debtors was reflected in various insurance policies issued by Petitioner (the "Policies"). Payment of the coverage provided under the Policies was governed by the terms of a payment agreement (the "Payment Agreement") to which a Schedule of Policies and Payments (the "Schedule") was appended.[2]

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1. VP Buildings was liquidated pursuant to the First Amended Joint Plan of Liquidation for VP Buildings, Inc., Its Subsidiary Debtors and Certain of Its Debtor Affiliates (the "Plan").

2. See Appendix to Brief of Appellant, National Union Fire Insurance Co. of Pittsburgh Pa., On Appeal from the United States Bankruptcy Court for the Northern District of Ohio, ("Pet. Dist. App.") at A171-81, A45-48.

The Payment Agreement provided, among other things, for the advance by Petitioner of the deductible portion of any loss for which VP Debtors was liable under the Policies, and the concomitant obligation of VP Debtors to reimburse Petitioner for such advances ("Deductible Loss Reimbursements"). Pet. Dist. App. A173, A47.

The services performed by Petitioner under the terms of the Policies and the Payment Agreement were, thus, two-fold. First, Petitioner must pay claimants damages, benefits or indemnity for which it is obligated under the terms of the Policies; second, Petitioner must advance on behalf of VP Debtors the deductible portion of any payments it makes to claimants under the terms of the Payment Agreement. Pet. Dist. App. A171-181, A45-47.

The foregoing insurance arrangements, consisting of both the provision of insurance coverage under the Policies and the advance of deductible payments under the Payment Agreement, is long recognized in the insurance industry and customarily referred to under different names i.e. a "Large Risk Rating Plan" or "Deductible Reimbursement Program" (the "Program").

In the Schedule appended to the Payment Agreement, an Estimated Payment Obligation[3] of VP Debtors was established. The Payment Agreement, in conjunction with the Schedule, provided the Billing Method pursuant to which various premium and other payments were to be made by VP Debtors, together with the due dates

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3. Capitalized terms used and not otherwise defined herein shall have the meanings ascribed to them in the Payment Agreement.

for such payments. Under the Payment Agreement, Petitioner reported on a monthly basis to VP Debtors the Loss Deductibles paid under the Policies and billed VP Debtors at its address reflected in the Schedule. In the case of Loss payments that exceeded the stated Sizable Loss Payment Amount, VP Debtors was required to pay the bill issued by Petitioner within ten days of its receipt. Pet. Dist. App. A46-47, A175.

The Schedule further contained a Security Plan which set forth the amount of collateral that Petitioner required VP Debtors to provide, in the form of letters of credit ($41,612,572), cash escrows and obligation bonds (surety). Id. at 47-48. This, in addition to the up-front premium of approximately $967,131, together with deposits and installment deposits, was required of VP Debtors under the terms of the Program. Thus, VP Debtors bore the substantial cost associated with not only the up-front premium, but also the purchase of the letters of credit and other forms of collateral required of it as well.

The amount of the up-front premium, letters of credit, installment deposits, obligation bonds (surety) and other forms of collateral required to be posted by VP Debtors was based upon actuarial assumptions developed by Petitioner, and might be further adjusted, at the unilateral discretion of Petitioner, depending upon the state of VP Debtors' financial condition at any point in time. Pet. Dist. App. A177-78.

The posted collateral was intended to cover Losses, i.e. damages, benefits or indemnity for which Petitioner became obligated under the terms of the Policies to pay to claimants, including Deductible Loss Reimbursements, i.e.

the portion of any Losses and Allocated Loss Adjustment Expense that Petitioner advanced on VP Debtors' behalf under the Policies. Pet. Dist. App. A173.

Petitioner was under no illusions at the time it entered into the Payment Agreement that VP Debtors, as a debtor-in-possession in an ongoing bankruptcy, had, as an operating company, anything but a short life expectancy, and knew or should have known that workers' compensation claims would extend well beyond the lifespan of VP Debtors itself. In these circumstances, the insurance premiums required by Petitioner and the collateral posted by VP Debtors were intended to cover all such Losses of Petitioner, including Deductible Loss Reimbursements under the Program.

In September 2003, shortly before the Plan was confirmed, Petitioner, apparently realizing it had miscalculated its collateral needs, submitted a claim for administrative expense priority. Pet. 8. The administrative claim included claims for Deductible Loss Reimbursement amounts that Petitioner had not yet advanced to injured workers for a variety of reasons, including that, in many cases, injuries had been incurred but not reported and, therefore, such claims might never be reported or paid. Thus, Petitioner's self-styled request for "reimbursement" was in reality a request for an acceleration of the Payment Agreement, contrary to its terms, and, based on actuarial estimates, of amounts that might or might not be due in the future. Furthermore, the disputed claims for "reimbursement" were for estimated payments that, if ever made, would not be made until after the termination of the VP Debtors' bankruptcy estate. *See, e.g.*, Pet. 10.

In the event Petitioner deemed itself undersecured, it not only could have demanded additional collateral, it could have actively participated in the Plan confirmation process and negotiated post-confirmation payments or the establishment of some form of escrow arrangement through incorporation of such requirement in the terms of the Plan. Nothing in the record indicates that National Union participated in the Plan confirmation process or, in fact, contributed anything to the formulation of the Plan. Instead, Petitioner elected to file a proof of claim and subsequently absent itself from the bankruptcy proceedings. Had Petitioner taken upon itself to defend its own interests, some alternative mechanism to that provided in the Payment Agreement might have supplemented the payment and collateral requirements provided thereunder to cover any incurred but not reported losses of Petitioner in the future.

Instead, Petitioner relied on the administrative expense process to solve its shortfall. The Code provides that creditors who extend goods and services to debtors in bankruptcy for the "actual, necessary costs and expenses of preserving [their] estate" are entitled to administrative priority, or in other words, to be paid ahead of unsecured creditors. 11 U.S.C. §§ 503(b)(1)(A), 507(a). VP Debtors filed an objection to those portions of Petitioner's claim for "reimbursement" that were for amounts Petitioner had not yet advanced and would not advance until after the termination of the VP Debtors' bankruptcy estate, if ever.

Pursuant to an Order of the United States Bankruptcy Court for the Northern District of Ohio (the "Bankruptcy Court"), certain matters were referred to arbitration, including, *inter alia*, the amount of Petitioner's claim

attributable to the post-petition period, and whether Petitioner was entitled to apply the proceeds of the letters of credit VP Debtors had supplied to such amounts. Pet. Dist. App. 414-415. The arbitrators determined that, the proceeds from the letters of credit which Petitioner had previously drawn down in reimbursement for its Losses were to be applied toward payment of its claims. However, this, in addition to the up-front premium and additional deposits previously paid by VP Debtors to Petitioner under the governing terms of the Payment Agreement, still was not sufficient to cover all of Petitioner's purported Losses. Petitioner asserts that the panel of arbitrators projected unreimbursed post-petition Losses of $2,494,498 with respect to the workers' compensation insurance issued to LTV and affiliates for Policy Year 2001, of which the pro rata share attributable to VP Debtors is approximately $993,769. Pet. 8-9. The Bankruptcy Court then considered whether this amount, which includes estimated future Deductible Loss Reimbursements, qualified as an administrative expense pursuant to the Bankruptcy Code.

The Bankruptcy Court, District Court and the Sixth Circuit all declined Petitioner's invitation to use administrative priority as a means of rescuing it from its own failure to protect its interests. Nevertheless, Petitioner asks this Court to intervene.

The narrow issue presented by this case is whether Petitioner may force VP Debtors to immediately reimburse, as an administrative expense, estimated Loss Deductibles that Petitioner had not yet paid as of the termination of VP Debtors' bankruptcy estate, and may never pay, notwithstanding that VP Debtors' reimbursement obligation is contingent on Petitioner's prior payment obligation.

REASONS FOR DENYING THE PETITION

A Petition for Certiorari should be denied where the decision below does not conflict with the decisions of other Courts of Appeals. Petitioner cites three cases in support of its assertions that various Courts of Appeals, in opposition to the Sixth Circuit, have held that administrative claims need not be liquidated and instead have held unliquidated amounts may properly constitute an administrative expense. However, not one of these cases involves Deductible Loss Reimbursements or analogous contractual provisions under an insurance contract requiring a bankruptcy court to unilaterally rewrite the very terms upon which the contract is based, turning the obligations of the respective parties "on their heads." In the instant case, Petitioner seeks to relieve itself of its own failure to take sufficient collateral to cover Deductible Losses based upon its own inaccurate actuarial assumptions and asks this Court to require VP Debtors to advance Petitioner funds to which it may never be contractually entitled and at VP Debtors' unsecured creditors' expense.

A Petition for Certiorari should be denied where the decision below does not conflict with a prior precedent of this Court. Petitioner asserts that the decision below conflicts with this Court's decision in *Reading*, a case clearly distinguishable from the case at bar. *Reading Co. v. Brown*, 391 U.S. 471 (1968). Damages incurred by the petitioner in *Reading* for which it sought administrative priority were entirely post-petition, not post-confirmation. As to the requirement that costs and expenses were required to be "actual," the complete destruction of a building in *Reading* could be nothing other than "actual."

In the instant case, Losses alleged by Petitioner involve workers' compensation claims based entirely upon actuarial assumptions both as to pre-confirmation known claims, as well as to incurred but not reported losses. The latter are unknown and may never be reported or paid.

A Petition for Certiorari should be denied where the decision below does not involve a question of exceptional importance. The decision below involves a very narrow question of law which Petitioner attempts to couch as a dispute involving a legal principle with far-reaching implications in order to cloak the true intention of Petitioner to rewrite the terms of a contract which, in this instance, has worked to Petitioner's disadvantage due to its own missteps. Second, the decision has only rarely been the topic of litigation and, third, to the extent courts have entertained the arguments advanced by Petitioner, each and every court has rejected them.

A. The Decision Below Does Not Conflict with the Decisions of Other Courts of Appeals

Petitioner asserts that the decision below "conflicts with the decisions of other courts of appeals." Pet. 18. That statement is at best, a gross exaggeration, and at worst, completely inaccurate. Other than the Sixth Circuit, no other courts of appeals have considered the precise question confronted here, namely, whether a bankruptcy court may or should rewrite the terms of a payment agreement by granting administrative priority to estimated future Deductible Reimbursements that are not due at the time the priority claim is made and may never come due.

After a lengthy buildup in which Petitioner cites circuit cases for principles that are not disputed by VP Debtors,[4] Petitioner cites only three cases in support of its assertions that "[s]ection 503(b) does not require that, in order to be 'actual,' the administrative claim must be 'liquidated'" and that "[o]ther courts of appeals . . . have concluded that unliquidated amounts can properly constitute an administrative expense." Pet. 21. Not one of the three cases relied on involves estimated deductible loss reimbursements or analogous claims i.e. claims that ask the bankruptcy court to rewrite the terms of a contract. Instead, the supposedly relevant cases involve insurance premiums due and owing pursuant to a policy at the time administrative priority was requested, estimated future claims for environmental cleanup costs under a federal environmental statute, and whether estimated liabilities should be considered for purposes of interpreting New Jersey's fraudulent transfer statute (a case that does not even mention § 503(b) but is offered as an allegedly analogous case). Pet. 21-22.

In further support of Petitioner's unfounded assertion that estimated future Deductible Reimbursements may be granted priority as "actual, necessary costs and expenses," Pet. 18, Petitioner focuses on the definition of "claim," 11 U.S.C. § 101(5), a definition that has absolutely no bearing on whether any particular "claim" is entitled to administrative priority treatment under 11 U.S.C. § 503(b). Pet. 21.

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4. See, e.g., Pet. 18-19 (citing *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950 (1st Cir. 1976) for the proposition that to be an "'actual, necessary' administrative expense, a debt must (1) arise from a transaction with the bankruptcy estate, and (2) directly and substantially benefit the estate.").

Finally, Petitioner asserts that the decisions below conflict with the decisions of other circuits because they allegedly focused on whether "costs" benefited the estate rather than on whether the "consideration supporting the claimant's right to payment" benefited the estate, and on when an expense was billed rather than on when a "service [was] rendered." Pet. 22-23. For the reasons discussed below, Petitioner's arguments are without merit.

The three cases relied on by Petitioner in support of the notion that "unliquidated" expenses should be granted administrative priority are materially distinguishable from the case at bar and i.e. lend Petitioner no aid. In the most factually analogous case, the Eighth Circuit considered whether to grant administrative priority for post-petition workers' compensation premiums that were recalculated post-confirmation pursuant to a retrospective rating policy. *Potter v. CNA Ins. Cos. (In re MEI Diversified, Inc.)*, 106 F.3d 829 (8th Cir. 1997). Under the policy, the insured and insurer agreed that the insurer would, at regular intervals, recalculate premiums due based on actual loss experience, which "resulted in a premium refund or an additional premium assessment." *Id.* at 831.

Less than a year after the insured's plan was confirmed, and before the bar date for submission of administrative claims, the insurer, pursuant to the policy, recalculated the premium for both pre- and post-petition periods, and then asserted administrative priority for that portion of the recalculated premium due for the coverage received during the post-petition, pre-confirmation period. *Id.* Both the Bankruptcy Court and the District court granted priority, and the Eighth Circuit affirmed.

This outcome is entirely consistent with the outcomes below in the case at bar; to the extent National Union sought administrative priority for amounts to which it was contractually entitled at the time it submitted its priority request, VP Debtors raised no objection. Unlike the claim in *MEI Diversified*, however, the disputed claim here is not for amounts that were actually due pursuant to the terms of the Payment Agreement. The disputed claim is for an estimate of amounts that may or may not become due in the future, and that indisputably were **not contractually due** from Respondent at the time Petitioner submitted its request. In contrast, the insurer in *MEI Diversified* did not ask the court to rewrite the terms of its contract with the insured and grant administrative priority to an amount **projected** to be due under the contract -- it only asked the court to grant administrative priority to amounts **actually** due under its contract attributable to the post-petition, preconfirmation period. *MEI Diversified* lends Petitioner no support for its contention that other courts of appeals have routinely recognized the type of administrative claim sought here as an "actual" expense.

The second case relied on by Petitioner provides even less support for its argument, as this supposedly analogous case does not involve an administrative priority claim or anything remotely analogous to such a claim. In *Advanced Telecomm. Network, Inc. v. Allen*, a Chapter 11 debtor sought to recover certain pre-petition transfers as fraudulent under New Jersey law. *Advanced Telecomm. Network, Inc. v. Allen (In re Advanced Telecomm Network, Inc.)*, 490 F. 3d 1325 (11th Cir. 2007). The case turned on whether the debtor was "insolvent" at the time the transfers were made as that term is defined under New Jersey's fraudulent transfer

statute. *Id.* at 1332 (interpreting N.J. Stat. Ann. §25:2-27.a). The Eleventh Circuit held that the bankruptcy court erred in making its insolvency determination because it failed to estimate the value of certain outstanding litigation liabilities and thereby overvalued the company. *Id.* While this case certainly establishes that estimates must be used when assessing the value of a company for purposes of determining whether a pre-petition transfer was fraudulent under New Jersey law, it says absolutely nothing about whether estimated future contractual obligations are appropriately deemed "actual" and "necessary" administrative expenses under § 503(b)(1)(A) of the Bankruptcy Code.

Finally, Petitioner relies on *In re Hemingway Transp. Inc.*, a case involving a CERCLA[5] claim by an entity that purchased contaminated land from a bankruptcy estate and was then subject to an enforcement action by the EPA. *Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.)*, 993 F.2d 915 (1st Cir. 1993). The purchaser sought administrative priority for current and future costs of cleanup, but the trustee objected that the purchaser's claim was contingent pursuant to 11 U.S.C. § 502(e), a section of the Code that applies when more than one debtor may have a right to a claim. The court remanded the case for a determination by the bankruptcy court as to whether the purchaser was entitled to any of the defenses under CERCLA, a determination that was essential for establishing whether the trustee's objections pursuant to § 502(e) were applicable.

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5. The Comprehensive Environmental Response, Compensation, and Liability Act, Codified at 42 U.S.C. §§ 9601 et seq.

The vast majority of the court's discussion focused on the purposes and interpretations of § 502(e) in the context of CERCLA claims, a provision that has no bearing on this case. Administrative expense priority pursuant to § 503(b) received barely a passing mention, let alone any discussion of why estimated future claims might be deemed "actual" expenses. However, National Union latches onto the court's speculative statement, made without elaboration or authority, that if § 502(e) does not apply, then the Petitioner would be entitled to administrative priority for estimated "past and future response costs." *Id* at 934.

Petitioner's reliance on this hypothetical dicta is misplaced. Even if the court had explained or offered authority for its contention that "estimates" of future CERCLA remediation costs are entitled to administrative priority, expenses incurred under CERCLA bear no relation to expenses incurred under the terms of a freely negotiated contract such as the Payment Agreement in the instant case. The purchaser's claim in *In re Hemingway* is entirely consistent with the structure and purpose of the CERCLA statute, "which entitles plaintiffs to recover their past and future environmental response costs." *American Nat'l Bank and Trust Co. of Chicago as Trustee for Illinois Land Trust v. Harcros Chemicals, Inc.*,1997 WL 281295 (N.D. Ill. May 20, 1997) (citing 42 U.S.C. § 9613(f)). By contrast, here Petitioner seeks revision of the terms of a contract that it agreed to with full knowledge of VP Debtors' financially precarious situation, and that provided it with the means of protecting itself through the adjustment of collateral requirements, which for unknown reasons, it failed to exercise.

Now, Petitioner, in effect, asks this Court to remedy its collateral miscalculation by unilaterally rewriting the Payment Agreement to advance Petitioner money to which it may never be contractually entitled, at the expense of the unsecured creditors. While it is well established that unsecured creditors generally cannot recover before costs associated with compliance with environmental laws are satisfied, *see, e.g., Texas v. Lowe (In re H.L.S. Energy Co.),* 151 F.3d 434 (5th Cir. 1998) (cost of plugging debtor's unused oil wells as required by state environmental law was entitled to administrative priority as actual and necessary expense of the estate); *Cumberland Farms, Inc. v. Florida Dep't of Envtl. Protection,* 116 F.3d 16 (1st Cir. 1997) (penalties stemming from failure to comply with state environmental laws post-petition were entitled to administrative priority); *Alabama Surface Mining Comm'n v. N.P. Mining Co. (In re N.P. Mining Co.),* 963 F.2d 1449 (11th Cir. 1992) (same), Petitioner has pointed to no cases establishing that such a rule should apply to insurers that miscalculate their collateral requirements.

In its effort to persuade the Court that projected claims not yet contractually due are "actual" for purposes of § 503(b) and, therefore, entitled to administrative priority, Petitioner cites § 101(5), which defines the term "claim" for purposes of the Bankruptcy Code. Petitioner implies that because a "claim" includes any "right to payment" whether "liquidated" or "unliquidated," the administrative priority provisions of the Code "do[] not require that, in order to be 'actual,' the administrative expense claim must be 'liquidated.'" Pet. 21. However, Petitioner offers no authority for its insinuation that the terms of § 101(5) have any bearing on whether a particular claim meets the tests for administrative expense priority under § 503(b). In fact, there is ample authority for the opposite.

"Claim" is intended to have a broad meaning, as it is the vehicle through which any and all creditors that have had dealings with a debtor in bankruptcy seek a right to payment. *See, e.g., Lemelle v. Universal Manufacturing Corp.*, 18 F.3d 1268, 1275 (5th Cir. 1994). However, as many of the cases cited by Petitioner make clear, administrative priority is to be narrowly construed. See, e.g. *Supplee v. Bethlehem Steel Corp (In re Bethlehem Steel Corp.)*, 479 F.3d 167, 172 (2d Cir. 2007) ("'[b]ecause the presumption in bankruptcy cases is that the debtor's limited resources will be equally distributed among his creditors, statutory priorities are narrowly construed,'" quoting *Trustees of the Amalgamated Insurance Fund v. McFarlin's, Inc.*, 789 F.2d 98, 100 (2d Cir.1986)). As the court in *In re Jack/Wade Drilling* noted, the question in an administrative priority case is not "whether [the creditor] deserves to get paid," (i.e. whether the creditor has a "claim") "but whether [the creditor] deserves to get paid at the expense of [the Debtor's] existing unsecured creditors." *Total Minatome Corp. v. Jack/Wade Drilling, Inc. (In re Jack/Wade Drilling, Inc.)*, 258 F.3d 385, 389 (5th Cir. 2001). In sum, administrative priority expenses are a small subset of bankruptcy claims and, therefore, the Code's definition of the term "claim" is in no way determinative of whether a particular "claim" is entitled to administrative priority and, specifically, of whether an unliquidated expense is "actual" for purposes of § 503(b)(1)(A).

In furtherance of its effort to create the perception of a circuit split, Petitioner, with heavy reliance on Judge Cook's concurrence, argues that the decisions below were flawed because they focused on whether "costs" incurred post-confirmation could have benefited the estate rather than on whether the services provided by Petitioner benefited the estate. Petitioner asserts that

other courts of appeals have "'focus[ed] not on when a creditor bills the debtor for its services, but on either: 1) when the debtor obligates itself to pay or 2) when the service is rendered.'" Pet. 22 (citing Cook, J. concurring). Petitioner then concludes summarily that its claimed expenses qualify as an administrative expense under either standard. However, this characterization of the issues, and the conclusions Petitioner draws from it, are flawed. The courts below were not mislead, as Judge Cook was, by a mistaken focus on "costs," which "cannot be necessary to or benefit anyone" Pet. 23 (citing Cook, J. concurring). Rather, they properly focused on when service was rendered and whether "the consideration supporting the claimant's right to payment was both supplied to and beneficial to the debtor in possession" as Petitioner urges. Pet. 23 (quoting *CIT Commc'ns Fin. Corp. v. Midway Airlines Corp. (In re Midway Airlines Corp.)*, 406 F.3d 229 (4th Cir. 2005)).

Each of the courts below properly noted that Petitioner had failed to provide all of the services or consideration that would entitle it to payment. For example, the Sixth Circuit Panel held that "National Union's claim will not be 'actual' *until it has made a payment* and seeks reimbursement from the insured . . . ." Pet. App. 9a-10a (emphasis added). The discrepancy in the outcome urged by Petitioner and that reached in the courts below stems not from the application of two different standards, but from an application of one undisputed standard to two different sets of facts. It is only through an oversimplification and distortion of the facts that Petitioner is logically able to reach a result contrary to that reached by the courts below and by the courts in *Zurich Am. Ins Co v. Lexington Coal Co.*, the only case "addressing the same question" Pet. 4,

as the matter at bar. *Zurich Am. Ins. Co. v. Lexington Coal Co. (In re HNRC Dissolution Co.)* 536 F.3d 683 (6th Cir. 2008) (affirming the district court's "well reasoned and comprehensive" opinion holding that estimated post-confirmation Deductible Loss Reimbursements were not entitled to administrative priority).

Petitioner would have this Court believe, as Judge Cook apparently did, that its sole obligation under the Program was to provide insurance in calendar year 2001, and that act alone was "consideration supporting the claimant's right to payment." *See, e.g.*, Pet. 16 (stating that Petitioner "supplied vital insurance coverage"). However, as the Program spells out, the terms were more complicated than that. Most importantly, VP Debtors' obligation to pay Deductible Loss Reimbursements to Petitioner was contingent on Petitioner first fulfilling its contractual obligation under the Policies to advance deductibles to claimants on behalf of VP Debtors. The Schedule laid out VP Debtors' payment obligation: "On a Monthly basis, [Petitioner] will report to [VP Debtors] the amounts of Loss and ALAE[6] that [Petitioners] have paid under the Policies. [VP Debtors] must **subsequently** pay [Petitioners] as described below." Pet. Dist. App. A47.

In other words, pursuant to the Program, Petitioner promised to do more than provide insurance coverage during the Policy Year; it promised to advance VP Debtors' deductible obligations to injured workers and then to seek reimbursement for those deductibles. Respondent's

6. "Loss and ALAE" refer to two different components of the deductibles that VP Debtors was obligated to reimburse under the Program.

obligation to reimburse Petitioner was contingent on Petitioner's performance of these obligations. The prices agreed to by Petitioner and Respondent took into account this extension of credit. Clearly, such an arrangement entails risk for both parties, but the Payment Agreement made significant provision for Petitioner to protect itself. It was entitled to and did secure collateral from VP Debtors and affiliates, and it retained the right to unilaterally adjust the collateral to reduce its exposure to the extent the insured's financial situation deteriorated.

In sum, the consideration supporting Petitioner's right to Deductible Loss Reimbursement was not only the provision of insurance under the Policies, but Petitioner's payment of VP Debtors' share of claims submitted by workers injured during the Policy Year. It is undisputed that at the time Petitioner sought administrative priority, it had no contractual entitlement to the claims VP Debtors disputes, because Petitioner had not yet advanced the Deductible Losses to injured workers. In fact, much of its claim was based on actuarial estimates, that by their very nature are speculative and may never materialize. The courts below found it determinative that Petitioner had not yet rendered the services that would entitle it to payment under the governing agreements. For example, as the Bankruptcy Court stated, "National Union seeks payment of claims that have not yet arisen pursuant to the terms of its agreement with VP Debtors, because *National Union itself has not paid the claims.*" Pet. App. 42a (emphasis added).

Thus, while Petitioner and Judge Cook would have this court believe that the decisions below reached the wrong conclusion by focusing on when costs were incurred

or even "billed" (which, incidentally, is a matter entirely within the control of Petitioner), Respondent counters that the decisions below properly focused on whether Petitioner had provided the services that would entitle it to payment. While Petitioner carried out its obligation to provide insurance during the policy year, at the time it sought administrative priority for the disputed claims it had not carried out its obligation to advance Deductible payments on VP Debtors' behalf. Having failed to carry out that portion of its contractual obligations that would have entitled it to Deductible Loss Reimbursement, Petitioner failed to submit an "actual" claim, as the courts below properly recognized.

In sum, there is no circuit split on the specific issue in the instant case, no circuit split on the general standards to be applied, and no error in the decisions of the courts below. The Petition should be denied.

B. The Decision Below Does Not Conflict with a Prior Precedent of this Court

Petitioner asserts that the decision below conflicts with a prior precedent of the United States Supreme Court. The sole decision cited by Petitioner in support of this proposition is *Reading Company v. Brown*, 391 U.S. 471 (1968), a case in which the bankruptcy court appointed a receiver to conduct the debtor's business of leasing a building. The building was totally destroyed by fire, as were several neighboring buildings, including one owned by Reading Company, the primary claimant in that case.

The *Reading* decision, rendered almost a half century ago, implicates section 64(a), of chapter XI, of the former

Bankruptcy Act, 11 U.S.C. § 104(a)(1), the predecessor to § 503(b) of the present Bankruptcy Code, the principal section of the Code which governs the matter at issue in the case at bar. Petitioner, by extensive reference to case law in support of the proposition that the decision in *Reading* survived enactment of the Bankruptcy Code, appears at great pains to persuade this Court that *Reading* retains continued viability. *See, e.g.*, Pet. 26-28. VP Debtors does not take issue with the views expressed in *Reading*, or to its continued viability, aged as that case may be, but VP Debtors does take issue with its applicability to the matters presently at issue. Accordingly, VP Debtors asserts that *Reading* fails to serve as appropriate precedent for the matters addressed in this case and that Petitioner is mistaken in its view that the decision of the Sixth Circuit Court of Appeals below conflicts with prior precedent of this Court.

It is noted, in this regard, that all the cases cited by Petitioner in support of the proposition that *Reading* survived enactment of the current Bankruptcy Code, see Pet. 26-29, may be further distinguished from the case at bar in that they involve costs and expenses incurred by the debtors therein post-petition during the continued operation of their respective businesses. No such case involves costs and expenses sustained by the debtors post-confirmation after the operation of their respective businesses ceased and they were no longer acting as debtors-in-possession.

At the outset, *Reading* involved circumstances totally distinguishable from those presented in the instant case. Damages incurred by the petitioner in *Reading* for which it sought administrative expense priority were entirely

post-petition, not post-confirmation. As a result, the *Reading* Court had no need to and, therefore, did not address whether post-confirmation costs and expenses could be "actual" and "necessary" for the preservation of a debtor's estate at a time when the debtor no longer operated a business or, for that matter, continued to exist. As to the requirement under § 64(a), that costs and expenses were required to be "actual," the complete destruction of a claimant's building in *Reading* could be nothing other than "actual." Such costs were easily determinable by contemporaneous replacement costs and valuation methods and were stated to the penny ($559,730.83). *Reading*, 391 U.S. at 473. In the case at bar, Losses alleged by Petitioner involve workers' compensation claims in amounts that are based entirely upon actuarial assumptions both as to pre-confirmation known claims, as well as to incurred but not reported losses. The latter, by their very nature, are unknown and may, in fact, never be reported or paid. They are typically long-term, extending well into the future and (if insurance related settlements are to serve as precedent) often subject to further adjustment.

Instead of addressing in a meaningful manner the issue of "actual" and "necessary" expenses found in § 64(a) of the Bankruptcy Act, the *Reading* Court elected to address that which it viewed as the decisive, statutory objective of the Bankruptcy Act, that of "fairness to all persons having claims against an insolvent." Pet. 25 (citing *Reading*, 391 U.S. at 477). However, it can hardly be said that "fairness" in one set of circumstances constitutes "fairness" under an entirely disparate set of circumstances.

Petitioner appears to argue, for it is not expressly stated, that were the post-confirmation claims of Petitioner not accorded administrative priority, the "decisive, statutory objective" which the Court in *Reading* sought to achieve would be undermined. In that event, we are informed, Petitioner "caught in a dilemma not of its own making" will be placed at a disadvantage imposed by VP Debtors attempting to escape its own financial dilemma. Pet. 25-26 (citing Reading, 391 U.S. at 477, 483). This is patently not the case. In fact, Petitioner made its own bed and now seeks not to lie in it.

The assertions of Petitioner to the contrary, from the perspective of "fairness to all persons having claims against an insolvent" which the Court in *Reading* sought to assuage, this is not an attempt by VP Debtors to escape from its own financial dilemma and to **unfairly** place the burden of its losses upon the shoulders of National Union. *Reading,* 391 F.2d at 477. The shortfall of Petitioner for any losses it may suffer are attributable solely to its own miscalculated actuarial assumptions, together with its subsequent ineptitude in defense of its own interests. This, notwithstanding its contractual ability to adjust that collateral required to be posted by VP Buildings under the Payment Agreement and to affirmatively protect its own interests in the bankruptcy process.

By this Petition, National Union now seeks to unburden itself of its own miscalculation by seeking administrative expense priority for such shortfall. Providing Petitioner administrative expense priority for post-confirmation losses would ultimately reduce those VP Debtors' assets otherwise available for distribution to its unsecured creditors. In such event, the principle

of "fairness" espoused by the *Reading* Court would be clearly compromised and allow Petitioner to "escape [its] dilemma at the risk of imposing it on others . . . ." *Id.* at 482-83.

Petitioner views its claim for unpaid Deductible Loss Reimbursements as the relevant "actual" and "necessary" costs that should be eligible for administrative expense priority under § 503(b) of the Code. Its premise is that applicable state laws require a debtor to maintain workers' compensation insurance in order to operate in bankruptcy as a debtor-in-possession. Petitioner states, "**when a trustee or debtor in possession operates a bankruptcy estate**, compliance with state law should be considered an administrative expense." Pet.31 (citing *N.P. Mining*, 963 F.2d at 1458) (emphasis added).

VP Debtors agrees that state laws generally require that a debtor maintain workers' compensation insurance in order to operate in bankruptcy as a debtor-in-possession. However, the *Reading* Court, as reflected in the cases the Court cites for such proposition, was clearly referring to claims arising post-petition during the time that the debtor is operating a business as **debtor-in-possession**, not post-confirmation when a debtor is, for all intents and purposes, non-operational and moribund. Any distributions to which creditors are entitled are resolved by confirmation and those expenses necessary to produce such distribution have been incurred pre-confirmation; expenses incurred post-confirmation cannot, by definition, be for the benefit of a debtor's estate. See, e.g. *HNRC*, 371 B.R. at 231-23 (citing cases for the proposition that "expenses arising post-confirmation fail to satisfy the requirements for administrative priority under § 503 for

the simple, yet inescapable reality that there is no estate to preserve or benefit." *Id.* at 231).

VP Debtors acknowledges the *Reading* Court interpreted the cost of insurance against claims arising during a bankruptcy arrangement to be "an administrative expense **potentially** payable in full." *Reading*, 391 U.S. at 483 (emphasis added). Petitioner quoted the opinion of the *Reading* decision in its Brief:

> The Court reasoned, "[i]t is of course obvious that proper insurance premiums must be given priority, else insurance could not be obtained; and if a receiver or debtor in possession is to be encouraged to obtain insurance in adequate amounts, the claims against which insurance is obtained **should be potentially payable in full**."

Pet. 26 (emphasis added).

The limited reference by the *Reading* Court to "premiums," as in most of the cases cited by Petitioner in the context of the "cost" or "expense" of insurance, reflect the customary terms of an insurance policy, not the financial payment arrangements presented by the Payment Agreement. Reference by the *Reading* Court to the ability of a debtor to obtain insurance which "should be potentially payable in full" is perfectly apt in the instant circumstances. The Deductible Loss Reimbursements for which provision is made in the Payment Agreement are, **in fact**, "potentially payable in full." That is the purpose of the contractual requirement for the payment of "premiums" thereunder, as well as the requirements

for additional cash deposits or the adjustment of required collateral in the event, among other things, of a change in the debtor's financial position.

Lastly, Petitioner claims that VP Debtors would keep the benefit, but avoid the burden, of the insurance that Petitioner supplied; that Petitioner will be "obligated to pay benefits to employees injured in 2001, but with no way to obtain the very reimbursement from the VP Debtors that the VP Debtors agreed to pay." Pet. 31. This is a retrospective view, analogous to "looking over one's shoulder," resigned to the fact that one can no longer recover that which was once obtainable if only the appropriate action had been taken in a timely manner. Petitioner could have **potentially** recovered an amount that would have yielded it the equivalent of "reimbursement in full," as it was empowered to do so by the terms of the Payment Agreement. In fact, Petitioner was empowered to take any number of actions which could have obviated the financial strait in which it now alleges it finds itself.

The Payment Agreement is replete with financial preconditions imposed upon VP Debtors to ensure that sufficient funds remain accessible or otherwise available to Petitioner in satisfaction of VP Debtors' obligations. VP Debtors is required to pay a Deposit, including a Claims Payment Deposit, Installments, together with Additional Payments, in amounts and by the dates set forth in Schedules appended to the Payment Agreement. Pet. Dist. App. A46-47. VP Debtors is further required to deliver Collateral acceptable in form and amount to Petitioner to secure VP Debtors' obligations under the Payment Agreement. *Id.* at A47-48.

Pursuant to the terms of the Payment Agreement, VP Debtors grants to Petitioner a continuing first-priority security interest and right of offset with respect to all premiums, surcharges, dividends, cash, accounts, or funds that are payable to VP Debtors and that currently or in the future come into the possession of VP Debtors in connection with its obligation under the Payment Agreement. *Id.* at A177. Any letters of credit that serve as collateral must be clean, unconditional, irrevocable and evergreen. *Id.*

The collateral supplied by VP Debtors to Petitioner to ensure the obligations of VP Debtors under the Payment Agreement is subject to annual review by Petitioner, and such further review and revision as Petitioner "deems reasonably necessary," including at any time upon the occurrence of any one of numerous events, e.g.:

> the failure or violation [by VP Debtors] of any financial covenants or tests, or minimum financial rating (if any) specified in the Schedule,
>
> or
>
> any material adverse change in the financial condition of [VP Debtors], [its] subsidiaries or affiliates taken or in combination, or any other entity on which [Petitioner] may rely for security or guarantee.

Id.

In other words, Petitioner retained numerous means at its disposal to "obtain the very reimbursement from the

VP Debtors that the VP Debtors agreed to pay." If any party bore the burden of loss, the terms of the Payment Agreement laid that burden squarely upon the VP Debtors. The loss suffered by Petitioner had nothing to do with the actions of the VP Debtors. The loss sustained by Petitioner was due singularly to its failure to take sufficient steps to protect itself from the inevitable termination of VP Debtors' estate. Had Petitioner demanded additional collateral or ensured that the Plan provided for recovery of monies post-confirmation in reimbursement for payments it would have to make in the future, Petitioner would not have suffered the shortfall it now alleges.

C. The Decision Below Does Not Involve a Questions of Exceptional Importance

The decision below does not involve a question of exceptional importance. First, the decision involves a very narrow question of law. Second, this alleged "vitally important question of bankruptcy law" has only rarely been the topic of litigation, strongly suggesting that Petitioner's concerns about "gravely negative consequences for chapter 11 reorganizations" are overblown, to say the least. Pet. 5, 32. Finally, to the extent courts have entertained the arguments advanced by Petitioner, each and every court has rejected them. The only sympathetic judicial reaction such views have received is that expressed in a Sixth Circuit concurrence by Judge Cook, joined by Judge White, who misconstrued the issues.

The narrow issue before this Court is whether Petitioner may force VP Debtors to immediately pay, as an administrative expense, estimated future Deductibles that Petitioner failed to pay as of the termination of VP

Debtors' bankruptcy estate and, in fact, may never pay, notwithstanding that the terms of the Policies and the Payment Agreement make VP Debtors' reimbursement obligation contingent on Petitioner's prior payment obligation. As recognized by the District Court in *HNRC*, the only case on record addressing the same "very narrow issue," the question is "whether [ ] prospective deductible obligations should receive administrative expense treatment." *HNRC*, 371 B.R. at 223.

Nevertheless, Petitioner has sought to couch the legal principle at issue as one with far-reaching legal implications. In fact, the legal principle at issue may involve no greater consequence than the interpretation to be given the terms of a relatively uncomplicated Payment Agreement between the contracting parties. Post-confirmation costs and expenses for which Petitioner seeks administrative expense priority are basically Deductible Loss Reimbursements which, as defined under the terms of the Payment Agreement, consist of the portion of any claims that Petitioner pays and which VP Debtors is obligated to reimburse. This includes any amount that Petitioner has advanced on behalf of VP Debtors for self-insured Deductibles under the Policies listed on the Schedule appended to the Payment Agreement. This is a simple, forthright, contractual obligation that "reimbursement" by VP Debtors follows "payment" by Petitioner, not the other way around. Despite the straightforward terms of the parties' Payment Agreement, and Petitioner's capacity to control the terms of any future such agreements it enters, Petitioner would have this Court believe that its immediate intervention is required to prevent "grave consequences."

For evidence that Petitioner's fears are overblown, one need look no further than to the fact that very few courts have ever been asked to address the issue at bar. As recently as 2007, the District Court in *HNRC* noted in its "comprehensive and well- reasoned opinion," HNRC 536 F.3d at 684, that the test for administrative priority is "facially silent - as is *the case law* [ ] - as to prospective expenses arising post-confirmation that stem from a contractual arrangement entered into by the debtor-in-possession during bankruptcy." 371 B.R. 210 (E.D. Ken., 2007) (emphasis added). The parties and the courts in that case all agreed it was a matter of first impression. *See, e.g., Id.* at 228. Petitioner has not identified any post-2007 cases involving post-confirmation claims arising from a pre-confirmation contract other than the decisions in *HNRC* and the case at bar, nor is VP Debtors aware of any. In other words, the federal courts have only very rarely been asked to address this issue, strongly suggesting that insurers and debtors have been able to reach mutually satisfactory arrangements without judicial intervention.

It may be justly inferred that in the multitude of bankruptcy cases in which, as Petitioner points out, insurance costs and expenses are a legal prerequisite to the operation of the business of a debtor-in-possession, such costs and expenses must have been adequately addressed through insurance coverages obtained by some other means.

Yet Petitioner argues (Judges Cook and White having taken note, in their "concurring" decision in the Sixth Circuit decision below) that the decision in *HNRC* will "spell an end to the availability of extended payment terms for insurance in the bankruptcy setting," that "'no insurer

will be willing to provide insurance to a bankrupt debtor on extended payment terms,'" and that this will hurt "cash-strapped debtors seeking to reorganize, because insisting on full, up-front payment would create an up-front drain on the debtor's scarce resources . . . ." Pet. 32-33 (in part, quoting Cook, J., concurring). The fact that the record in the instant case does not reflect one shred of evidence supporting Petitioner's position has not deterred Petitioner from making the same argument in each court in which this case has been heard. In point of fact, VP Debtors has obtained anecdotal evidence to the contrary.

The Sixth Circuit decision in *HNRC* was delivered on August 13, 2008, and, since that date, numerous bankruptcies have come and gone, and no other court has had need to address the issue which Petitioner has continued to present in the same "calamitous" context. Debtors have continued to receive debtor-in-possession financing sufficient to "pay in full" their insurance costs and expenses in order to operate their respective businesses in accordance with state laws. Many have continued to post collateral similar to that posted by Petitioner under the Payment Agreement or have entered alternative escrow arrangements within the parameters established by various plans of reorganization or liquidation. *See, e.g.*, *HNRC*, 371 B.R. at 235 (noting that the insurer's claim in that case stemmed from a failure of collateral, and that "there is nothing to suggest that future parties will not continue to negotiate collateralization of deductible risks," and possibly require "even greater collateralization . . . ."). During this time frame, insurers have participated in bankruptcy proceedings for the purpose of ensuring that plans of reorganization and liquidation provide adequate protection for the payment of insurance losses

in full. The only "consequence" the decision below is likely to have is to encourage insurers to be more prudent in the formation and administration of their payment agreements with debtors in bankruptcy.

Petitioner's protests to the contrary notwithstanding, the few courts that have considered the proposition upon which the case presented by Petitioner is predicated have all rejected it. Specifically, the decisions rendered in *HNRC* and in the case at bar in two Bankruptcy Courts, two District Courts, and on no less than three separate occasions in the Sixth Circuit Court of Appeals, have all held that prospective deductible obligations are not entitled to administrative priority.[7] Notwithstanding this less than outstanding lineage, Petitioner requests that this Court yet again address the very same issue which, on a prior occasion, it determined not to address, having denied a Petition for a Writ of Certiorari on the question of whether post-confirmation costs and expenses of an insurer are entitled to administrative expense priority under § 503(b) of the Code. *Zurich Am. Ins. Co. v. Lexington Coal Co.*, 129 S.Ct. 2866 (2009).

Having failed to persuade the courts below that other cases serve as adequate precedent for the proposition that post-confirmation costs and expenses of an insurer are eligible for administrative expense priority under the Code, Petitioner now chooses to "hang its hat" on the somewhat tenuous arguments presented by Judge Cook

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7. *In re HNRC Dissolution Co.*, 343 B.R. 839 (Bankr. E.D.Ky. 2006); *Zurich Am. Ins. Co. v. Lexington Coal Co. (In re HNRC Dissolution Co.)*, 371 B.R. 210 (E.D.Ky. 2007), *aff'd*, 536 F.3d 683 (6th Cir. 2008); Pet. 1a-49a.

who, in a "concurring" opinion in the Sixth Circuit decision below, considered herself bound by the prior Sixth Circuit decision in *HNRC*, but, nevertheless, recommended that such decision be reviewed (and, inferentially, overturned), a recommendation thereafter rejected by the sitting judges of the Sixth Circuit. Pet. App. 13a-18a.

Judge Cook unfortunately misconstrued the issues at hand in a decision that became entangled in matters related to the timing of "billing," notwithstanding that "billing" seemed not at all an issue that the courts below felt compelled to address. Judge Cook stated, at various points in her "concurring" opinion, for example, that:

> ...[other courts of appeals'] focus not on when a creditor **bills** the debtor for its services, but on either: 1) when the debtor obligates itself to pay or 2) when the service is rendered.

Pet. App. 15a. (emphasis added);

Petitioner adopts this analysis:

> The decision below, left standing, will have gravely negative consequences for chapter 11 reorganizations. It creates a loophole allowing a debtor in bankruptcy to avoid paying for necessary insurance purchased during the course of its bankruptcy proceeding by the simple expedient of confirming its plan before a creditor submits its **bill** or otherwise liquidates its claim.

Pet. 32 (emphasis added).

There can be no question in the instant case that VP Debtors manipulated either its filing in bankruptcy (the insurance arrangements between Petitioner and VP Debtors were renewed and the Policies issued after VP Debtors filed in bankruptcy, *see, e.g.*, Pet. 7) or the effectuation of Plan confirmation before Petitioner submitted its bill as Petitioner suggests. As reflected in the discussion of the billing requirements under the Payment Agreement in VP Debtors' Statement at the beginning of this Brief, "billing" by Petitioner was undertaken on a monthly basis and payment thereof by VP Debtors was due within a fixed time frame thereafter. As to liquidation of Petitioner's claims, as in the case of any insurer, adjustment and liquidation of claims is invariably under the control of the insurer, rather than the insured. It is truly implausible for anyone at all familiar with insurance company procedures, not to mention the bankruptcy process, to argue that a debtor may time confirmation of its reorganization plan around the anticipated billing of insurance. Interestingly, all this concern has little, if any, significance for the issues at hand. What is of significance is not when bills are rendered, it is when claims are paid. Under the terms of the Payment Agreement, reimbursement follows payment, not the other way around.

Petitioner is mistaken in its leap of logic that this is a matter of exceptional importance which this Court once again needs to address. No Circuit Court, other than the Sixth Circuit Court of Appeals, has expressed the slightest interest in the issue presented since the Supreme Court last denied certiorari in *HNRC*.

Certiorari is unwarranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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